Office-Supreme Court, U.S.
FILED
DEC 21 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 52

THE NEW YORK TIMES COMPANY,
A Corporation,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HERBERT BROWNELL
THOMAS E. DALY
25 Broadway
New York, New York
Attorneys for Petitioner
The New York Times Company

LOUIS M. LOEB
HERBERT WECHSLER
RONALD S. DIANA
LORD, DAY & LORD
BEDDOW, EMBRY & BEDDOW
of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	12
Conclusion	17
Appendix	19

CITATIONS

Cases:

Abernathy v. *Patterson*, 295 F. 2d 452, cert. den. 368 U. S. 986	9, 11
Bates v. *City of Little Rock*, 361 U. S. 516	16
W. E. Belcher Lumber Co. v. *York*, 245 Ala. 286	10, 13
Birmingham News Co. v. *Birmingham Printing Co.*, 209 Ala. 403	12, 13
Board of Education v. *Barnette*, 319 U. S. 624, 634	16
Burns v. *Campbell*, 71 Ala. 271, 289, 290	10, 13, 15
Cramp v. *Board of Public Instruction*, 368 U. S. 278	16
Fogg v. *Boston & Lowell R. R.*, 148 Mass. 513, 20 N. E. 109	14
Goldfield v. *Brewbaker Motors, Inc.*, 54 So. 2d 797 cert. den. 54 So. 2d 800	12, 13
Guzman v. *Pichirilo*, 369 U. S. 698	14
Hellar v. *Bianco*, 111 A. C. A. 435, 244 P. 2d 757 (Cal. App.)	14

PAGE

King v. Order of United Commercial Travellers of America, 333 U. S. 153 14

Lambert v. *California*, 355 U. S. 225 16

Louisiana v. *N.A.A.C.P.*, 366 U. S. 293 16

N.A.A.C.P. v. *Alabama*, 357 U. S. 449 16

The New York Times Company v. *Sullivan*, 144 So. 2d 25 ..... 4, 15

Robinson v. *California*, 370 U. S. 660 16

Shelton v. *Tucker*, 364 U. S. 479, 488 16

Talley v. *California*, 362 U. S. 60 16

Tidmore v. *Mills*, 32 So. 2d 769 (Ala. App.) 14

Statutes:

Title 28 U. S. C. § 1332 3

Title 28 U. S. C. § 1441 3

Rule 52(a) Federal Rules of Civil Procedure 12

Miscellaneous:

150 A. L. R. 1349 13

Restatement, Agency 2d, Reporter's Note to Section 94 13

IN THE

Supreme Court of the United States

October Term, 1962

No. ____

THE NEW YORK TIMES COMPANY,
A Corporation,

Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 19, 1962.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (Appendix, *infra*, p. 30) are reported in 308 F. 2d 474. The opinion of the District Court (Appendix, *infra*, p. 19) is reported in 195 F. Supp. 919.

Jurisdiction

The judgment of the Court of Appeals was rendered on September 18, 1962. A petition for rehearing and motion for rehearing en banc were denied on November 19, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Question Presented

Libel actions instituted in the Circuit Court of Montgomery County, Alabama, by the Governor of the State and an elected Commissioner of the City of Montgomery, based on the publication of an advertisement allegedly critical of their official action, named as defendants the petitioner, a New York corporation, and four Negro clergymen, resident in Alabama, whose names appeared on the advertisement as endorsers of its appeal for funds for the legal defense of Martin Luther King and student groups demonstrating for racial equality.

The only evidence that plaintiffs can adduce against the resident defendants is that their names were placed on the advertisement without their knowledge or consent by one with whom they had no agency relationship; that they remained silent when the plaintiffs, shortly before filing suit, sent them a demand to publish a retraction; and that an organization of which they were officers subsequently received some of the funds raised by the advertisement for use in the defense of student demonstrators.

The Court of Appeals held that, on these facts, there was a reasonably arguable case against the resident defendants, precluding petitioner's removal of the actions to the United States District Court on the ground of diversity of citizenship.

The question presented is whether this decision is in conflict with applicable Alabama law or attributes to the State the possible adoption of a rule of liability repugnant to the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment provides:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

U. S. C., Title 28 § 1332 provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties . . ."

U. S. C., Title 28 § 1441 provides:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. . . ."

Statement

These are two of five libel actions brought by Alabama officials against petitioner, a New York corporation, and four co-defendants, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, all of whom are citizens of Alabama. The suits were based on the publication in *The New York Times* on March 29, 1960, of an advertisement sponsored by an organization called the "Committee to Defend Martin Luther King and the Struggle for Free-

dom in the South". The advertisement (R. 14) portrayed the activities and protests of students and others engaged in non-violent demonstrations under the leadership of Dr. King against the practices of racial segregation and concluded with an appeal for funds to support the legal defense of Dr. King, who had been charged with perjury, the support of the students and the struggle for the right to vote. The names of the four resident defendants appeared on the advertisement as endorsers of the appeal for funds.

Governor Patterson instituted his action in the Circuit Court of Montgomery County, Alabama, on May 30, 1960, claiming $1,000,000 damages (R. 211-216) and Commissioner Parks, one of the three elected Commissioners of Montgomery, brought suit on April 19, 1960, demanding $500,000 (R. 8-14). The publication alleged to have libeled the plaintiffs is the same advertisement as that involved in *The New York Times Company* v. *L. B. Sullivan* and *Abernathy, Shuttlesworth, Seay, Sr.*, and *Lowery* v. *L. B. Sullivan*, pending on petitions for writs of certiorari to the Supreme Court of Alabama, Nos. 606 and 609, this Term. Except for the differences in the offices held by the respective plaintiffs, the complaints in these two actions are substantially the same as in the *Sullivan* case and in the two other suits based on the advertisement, which were brought by Mayor James of Montgomery and by former City Commissioner Sellers. Governor Patterson's complaint also named Martin Luther King, Jr., as a defendant but Dr. King, a citizen of Georgia, was not served with process in Alabama and did not appear in the cause. He did, however, file a consent to the removal of the action to the District Court.

The *Sullivan* case was tried in the Montgomery Circuit Court in November, 1960, resulting in a verdict and judgment for the plaintiff against all defendants for $500,000.

the full amount claimed. The *James* case was tried thereafter, ending on February 1, 1961 with a verdict for the plaintiff also for $500,000. Petitioner's motion for a new trial in the *Sullivan* case was denied on March 17, 1961; that in the *James* case is still pending before the Montgomery Circuit Court. The Supreme Court of Alabama affirmed the *Sullivan* judgment on August 30, 1962 (144 So. 2d 25).

On April 13, 1961, shortly before the *Parks* case was to come to trial, petitioner removed the *Parks*, *Patterson* and *Sellers* cases to the United States District Court for the Middle District of Alabama. The petitions for removal (R. 3-8; 205-211) set forth the diversity of citizenship between the defendant and the respective plaintiffs in each of the actions and averred that the four Alabama co-defendants had been fraudulently joined as parties, in the sense that there was "no reasonable basis under the law of Alabama" upon which their liability could be established. In support of the averment of fraudulent joinder, the petition stated that at the trials in the *Sullivan* and *James* cases "the uncontroverted evidence of the four resident defendants showed that they had not in any manner authorized or consented to the using of their names as indorsers of the advertisement which gave rise to the alleged libel, and that they exercised no authority or control over the defendant, the *New York Times Company*, nor sustained any legal relationship to it"; that "the theory of liability" advanced by the plaintiffs "was based on an assumed duty to disavow any connection with the allegedly libelous advertisement and the respective juries were erroneously charged by the trial Court that the said resident defendants' consent to the publication . . . could be inferred from their failure to so disavow"; that the "only facts on which the plaintiff purported to establish a liability against the

resident defendants" consisted of the printing of their names as indorsers of the appeal for funds, the plaintiff's written demand for a retraction and the failure of the defendants to reply, retract or disavow; that these facts do not constitute a basis for liability under the law of Alabama. Finally, in support of the timeliness of the removal, the petition stated that it "did not sufficiently appear to the defendant" that the cause was removable because of the fraudulent joinder of the resident defendants until after the trials of the *Sullivan* and *James* cases in the Montgomery Circuit Court.

Patterson and Parks moved to remand (R. 17-21; 219-224), contending that the verdicts and judgments in the *Sullivan* and *James* cases established that the evidence against the resident defendants sufficed to present a jury question as to their liability; and that the petitions for removal were, in any case, untimely under 28 U. S. C. § 1446(b).

The District Court held a hearing on the motion at which the record in the *Sullivan* case was received in evidence in support of the removal (R. 32-35).* It showed that each of the resident defendants denied unequivocally under oath that he had authorized the use of his name on the advertisement or that he knew of its publication prior to receiving the demand for a retraction or that he had seen it prior to the institution of the action or that he was a member of the Committee to Defend Martin Luther King or connected with the Committee in any way (S. Tr. 1914-1931). The record also showed that John Murray, one of the writers who prepared the advertising copy, testified

* This transcript was not printed in the record in the Court of Appeals, the original having been transmitted to the Court under Rule 75 i (R. 263). The transcript is included in the record filed with this petition and is here referred to as "S. Tr."

that the original draft of the proposed advertisement did not contain the statement "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal" or any of the names printed thereunder, including those of the defendants. That statement and those names were added on the suggestion of Bayard Rustin, the Director of the Committee to Defend Martin Luther King, who told Murray that it was unnecessary to obtain the consent of the individuals involved since they were all members of the Southern Christian Leadership Conference, as indicated by its letterhead, and "since the SCLC supports the work of the Committee . . . he [Rustin] . . . felt that there would be no problem at all, and that you didn't even have to consult them" (S. Tr. 1933-1935, 1936).

This was all the evidence in the *Sullivan* action relating to the resident defendants. The Montgomery Circuit Court ruled, nonetheless, that there was a case for submission to the jury (S. Tr. 1944), charging as follows (S. Tr. 1952-1953):

> "Now, it is the contention of the plaintiff here that although you may believe, as to the four individual defendants, that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff, Sullivan, that the four individual defendants after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names, that is, that they approved and sanctioned this advertisement. In other words, the plaintiff, Sullivan, insists that there was a ratification of the advertisement and the use of their names as signers of the advertisement by the four individual defendants and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous

authorization and is a confirmation or approval of what has been done by another on his account. Now, it is for you twelve jurors to say from all the evidence whether the four defendants ratified the advertisement now before you, that is, ratified that advertisement as I have defined the word ratification to you."

At the hearing before the District Court, counsel for Governor Patterson asserted (R. 78) that he expected to take the deposition of Martin Luther King, Jr., whose evidence he expected "to show that this committee had the names of these resident defendants and that they had authority to use it". In view of this statement, and over the objection of counsel for Parks (R. 168), the Court ordered the testimony of Dr. King to be taken by deposition, designating counsel to interrogate the witness for the Court (R. 165-167).

Martin Luther King, Jr., testified* that he was president of the Southern Christian Leadership Conference and had been since it was founded in 1957; that Rev. Abernathy was the treasurer, Rev. Shuttlesworth the secretary, Reverend Lowery third vice-president and Rev. Seay a member of the executive board; that there was "no relationship" between the Southern Christian Leadership Conference and the Committee to Defend Martin Luther King; that the Conference had not taken any formal or informal action to support the Committee, which was formed "by concerned citizens in New York"; that most of the members of the Conference Board were unaware that the Committee was formed; that no authority had ever been given to the Conference to use the names of the Conference or any of its members in connection with the program of the Committee;

* The transcript of Dr. King's testimony was not printed in the record in the Court of Appeals, the original having been transmitted to the Court under Rule 75 i (R. 203). The transcript is included in the record filed with this petition and is here referred to as "K. Tr."

that no such authority had been solicited by the Committee or given to it by him or by anyone else; that the Conference had never endorsed the advertisement or ratified it in any way; that none of the four resident defendants served on the Committee; that he knew of no basis for Rustin's statement to Murray that the defendants' names could be used without consulting them (K. Tr. 5-12, 14); and that he himself had no connection with the Committee (K. Tr. 45-46).

Dr. King also testified that the Southern Christian Leadership Conference had received some funds from the Committee to Defend Martin Luther King for the assistance of the student movement (K. Tr. 47); that the individual defendants did not receive any such funds as individuals, though they may have "as heads of organizations" (K. Tr. 46); that "otherwise the Committee had direct relationship with the lawyers" (K. Tr. 47).

The Court also received in evidence (R. 47) the verified complaint (R. 109-164) in an unsuccessful action in the United States District Court brought by the resident defendants against Governor Patterson, Mayor James, Commissioners Sullivan and Parks and others, seeking *inter alia* to enjoin the prosecution of these libel actions, to set aside the judgments in the *Sullivan* and *James* cases and to enjoin the sale of property under executions levied on those judgments. See *Abernathy* v. *Patterson*, 295 F. 2d 452, *cert. denied*, 368 U. S. 986.

That complaint contained an allegation (R. 118) referring to the advertisement as having been inserted in *The New York Times* by "supporters of the plaintiffs [Abernathy *et al.*] and the movement for equality which they lead, on their own, and pursuant to their own responsibility, utilizing the channel of a free press . . ." It also described the purpose of the advertisement to include soliciting "sup-

port for the defense of the Reverend Martin Luther King, Jr., a leader in the movement in which the plaintiffs [Abernathy *et al.*] participate as active leaders" and soliciting "support for the plaintiffs herein and their supporters in their peaceful activities for the enforcement of their right to vote" (R. 118, 119). These allusions to "supporters" and "support" were adduced as admissions by the resident defendants tending to establish their liability for the publication of the advertisement.

On the foregoing record, the District Court denied respondents' motions to remand (R. 187). Its opinion found the facts to be as follows (R. 182; Appendix, *infra*, p. 25):

> ". . . The evidence shows that the article in question was placed in The New York Times by an individual named John Murray, who was acting for a committee to defend Martin Luther King, Jr. Murray inserted the names of the four resident defendants as sponsors of the article. They were neither officers nor members of the committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted."

On these facts, the Court concluded that under the principles declared by the Supreme Court of Alabama in *Burns* v. *Campbell*, 71 Ala. 271, 289, 290 and reaffirmed in *W. E. Belcher Lumber Co.* v. *York*, 245 Ala. 286, "there is no legal basis whatsoever for the claim asserted against the resident defendants": that "no liability on the part of the resident defendants existed under any recognized theory

of law"; and that their "joinder in each of these cases was therefore 'fraudulent' as that term is applied in removal cases" (R. 180; Appendix, *infra*, p. 23).

The Court also held that the twenty-day period prescribed by 28 U. S. C. § 1446 does not apply in "instances of fraudulent joinder" where the Courts "should accept petitions filed within a reasonable time after the right to removal becomes apparent (that is; after the fraudulent joinder becomes evident)" (R. 184; Appendix, *infra*, p. 27). It "specifically" found "that in each of these cases the removal to this Court on April 13, 1961, was within a reasonable time after it could have and should have become apparent to the defendant The New York Times Company that there was no reasonable basis under the law of Alabama upon which the liability of the individual defendants could be established for and on account of the alleged libelous publication made the basis for plaintiffs' actions" (R. 185; Appendix, *infra*, p. 28).

On interlocutory appeal, authorized under 28 U. S. C. § 1292(b) (R. 193-195), the Court of Appeals reversed by a divided vote. Without passing on the timeliness of the removal (Appendix, *infra*, p. 40), Judge Bell, with the concurrence of Judge Brown, held that there was "a reasonable basis in law and fact" for the contention that the resident defendants had ratified or adopted the advertisement, in view of their failure to respond to the letters demanding a retraction or to disavow the use of their names, the allegation in the complaint in *Abernathy* v. *Patterson* "that the advertisement was for their benefit and support" and the testimony of Dr. King that the Southern Christian Leadership Conference, in which the resident defendants were officers, "received some of the funds raised through the medium of the ad." The question was

said to be "a close one" which "could go either way" (Appendix, *infra*, pp. 38, 40). Judge Ainsworth dissented on the ground that the "circumstances here did not oblige" the resident defendants "to issue a denial about the publication when demand for a retraction was made by plaintiffs upon them"; that there "is no evidence whatsoever on the part of the resident defendants of ratification by silence or otherwise"; and that the findings of fact by the District Court should, in any event, have been accepted under Rule 52 (a), Federal Rules of Civil Procedure (Appendix, *infra*, pp. 44, 45).

REASONS FOR GRANTING THE WRIT

I

In holding that there is a reasonably arguable case against the resident defendants, based on their alleged ratification or adoption of the publication claimed to constitute a libel, the Court of Appeals has decided an important question of Alabama law, the determination of which also governs the existence of the federal right of removal, in a way that conflicts with applicable state law.

The decision holds that total strangers to a publication, whose names are placed on it without their knowledge or authority by one with whom they have no agency or other relationship, may reasonably be held to incur liability for libel in the publication by remaining silent in the face of a demand for a retraction, if an organization of which they are officers is subsequently benefited by the publication. The Court's conclusion that the "question of liability" is "a close one", which "could go either way" under the law of Alabama is based primarily upon the rule declared by the Alabama Supreme Court in *Birmingham News Co.* v. *Birmingham Printing Co.*, 209 Ala. 403, 96 So. 336 and reaffirmed in *Goldfield* v. *Brewbaker Motors, Inc.*, 74 So.

2d 797, *cert. denied*, 54 So. 2d 800 (Appendix, *infra*, p. 39). The rule of those decisions is, however, patently inapplicable to this case. Both *Birmingham News* and *Goldfield* involved contract claims, not an asserted liability for tort, and least of all for defamation. Moreover, they involved situations where there was a pre-existing and continuing relationship between the defendants and the purchaser whose contract the defendant was asserted to have ratified.

The Alabama rule in tort is that declared in *Burns* v. *Campbell*, 71 Ala. 271, reaffirmed in *W. E. Belcher Lumber Co.* v. *York*, 245 Ala. 286, 17 So. 2d 281, on which the District Court relied (R. 182-3; Appendix, *infra*, pp. 25-26) but which are not referred to in the Court of Appeals' opinion. Under these decisions, it is only where "the relation of agency exists, and the principal derives a benefit from an act beyond the scope of the agency," that "the principal will be held to have ratified such unauthorized act by acquiescence, if, after being fully informed of what has been done, he fails to express his dissatisfaction within a reasonable time." Even then the principal is not "fully informed of what has been done" unless he is "fully informed of its tortious character". 245 Ala. at 288.

The distinctions between tort and contract cases and between the situation where there is and there is not a pre-existing agency or similar continuing relationship are not, moreover, unique to the law of Alabama. They pervade the decisions everywhere throughout the country, reflecting the important difference between liability arising from consensual transactions, including the selection of an agent, and liability based solely on the perpetration of a wrong by someone else. See 150 A. L. R. 1349; *Restatement, Agency* 2d, Reporter's Note to Section 94, pp. 169-172. It is especially to be respected in a libel action, we submit, where if the law were to require disavowals by

those innocent of publication, it would create difficulties of the kind so patently presented in this case.

There are, to be sure, rare instances in which a liability for defamation has been based upon mere non-feasance of the defendant, such as failure to remove a libel posted on one's premises, but they all rest upon a special power and resulting duty of control. See *Tidmore* v. *Mills*, 32 So. 2d 769 (Ala. App.); *Hellar* v. *Bianco*, 111 A. C. A. 435, 244 P. 2d 757 (Cal. App.); *Fogg* v. *Boston & Lowell R. R.*, 148 Mass. 513, 20 N. E. 109. Both courts below correctly deemed such cases inapposite here. No less irrelevant are cases dealing generally with silence as an admission of an accusation. See 4 *Wigmore, Evidence* § 1071 (3d ed. 1940). The District Court found as a fact that failure to retract or disavow did not admit prior consent to publication; and that the uncontradicted evidence showed that the resident defendants did not in fact authorize the publication or the using of their names. That finding was binding upon and was accepted by the Court below. *Cf. Guzman* v. *Pichirilo*, 369 U. S. 698.

There remains, therefore, only the action of the trial court in the *Sullivan* and *James* cases, in submitting the issue of ratification to the jury, to impeach the District Court's conclusion on the law of Alabama. The Court of Appeals explicitly did not base its decision "solely on this fact", in recognition of the point that *nisi prius* state court rulings are not binding on federal courts (*King* v. *Order of United Commercial Travelers of America*, 333 U. S. 153). Its opinion does, however, state that "there is no reason why their rulings may not be considered on the question of good faith in a matter such as this" (Appendix, *infra*, p. 37).

We submit that the District Court was right in disregarding the *Sullivan* ruling on the ground that it is con-

trary to Alabama law, as declared by the highest court in *Burns* and *Belcher*, *supra*. Indeed, if the erroneous ruling of the state trial court were given weight in passing upon claims of fraudulent joinder, the protection of non-resident defendants, which the removal is designed to afford, would be defeated in the cases where it is required most, such as the situation here.

The subsequent affirmance of the *Sullivan* judgment against the resident defendants did not, moreover, add the slightest sanction to the trial court's ruling in that case. The Supreme Court of Alabama deemed neither the sufficiency of the evidence against these defendants nor the correctness of the instruction as to ratification properly before it on appeal and did not, therefore, pass upon these issues. See *The New York Times Company* v. *Sullivan*, 144 So. 2d 25, 45, 46.

Thus the *Sullivan* decision does not influence the answer to the question here presented. It does, however, emphasize its grave importance at this time.

II

The decision that there is a reasonably arguable case against the resident defendants not only conflicts with state law, as evidenced by the applicable decisions of the Supreme Court of Alabama. It also attributes to the State the possible adoption of a rule of liability so burdensome and arbitrary in its impact on personal liberty that it would be repugnant to the Fourteenth Amendment.

The Court of Appeals has held that a State may reasonably cast on persons whose only connection with a publication is that their names were used without their knowledge or authority, the duty to retract or disavow the publication on demand, under pain of punitive award of damages, if

a jury should construe their silence as approval of statements deemed to constitute a defamation. We think it clear that such a rule of liability would, if adopted by a State, infringe due process limitations. It would impose a burden of investigation and appraisal far more onerous and arbitrary than the affidavits, the requirement of which was held to violate due process in *Louisiana* v. *N.A.A.C.P.*, 366 U. S. 293 and *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. It would exert compulsion to make a disclosure of belief no less invidious than that condemned in *Board of Education* v. *Barnette*, 319 U. S. 624, 634, or less restrictive than the limitation upon anonymity held to abridge free speech in *Talley* v. *California*, 362 U. S. 60. See also *Bates* v. *City of Little Rock*, 361 U. S. 516; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; *Shelton* v. *Tucker*, 364 U. S. 479, 488. It would condemn mere passivity with less justification than the registration ordinance held incompatible with due process in *Lambert* v. *California*, 355 U. S. 225 or the punishment of disposition found invalid in *Robinson* v. *California*, 370 U. S. 660.

The arbitrary operation of the rule is well illustrated by the present case. The names of the resident defendants were not even included in the list of signatories to the text embodying the alleged libels but rather in a separate list of names under the separate statement that "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal" (R. 14). The "appeal" was, of course, the appeal for funds for the defense of Martin Luther King, the support of the "embattled students" and the "struggle for the right to vote"—causes which the defendants may be assumed to support. What were they required to do or say, when they were served with the demand to publish a retraction, to avoid the liability which the Court of Appeals has held may reasonably be imposed?

Neither the charge of the trial Court in *Sullivan* nor the opinion of the Court below provides an answer which, in our view, comports with constitutional protections.

This contention is included in the questions sought to be presented by the resident defendants in their petition for a writ of certiorari to review the judgment in the *Sullivan* case. See *Abernathy et al.* v. *L. B. Sullivan*, No. 609, this Term. We believe the question calls for the consideration of this Court on that petition and that it should be considered in this case as well.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HERBERT BROWNELL
THOMAS F. DALY
Attorneys for Petitioner
The New York Times Company

LOUIS M. LOEB
HERBERT WECHSLER
LORD, DAY & LORD
BEDDOW, EMBRY & BEDDOW
of Counsel

APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF ALABAMA,

NORTHERN DIVISION

FILED
Jun 26 1961
R. C. DOBSON
Clerk

By ..... *Deputy Clerk*

FRANK W. PARKS,
Plaintiff,

vs.

THE NEW YORK TIMES COMPANY, a corporation, RALPH D. ABERNATHY, FRED L. SHUTTLESWORTH, S. S. SEAY, SR., and J. E. LOWERY,
Defendants.

CIVIL ACTION
No. 1706-N

JOHN PATTERSON,
Plaintiff,

vs.

THE NEW YORK TIMES COMPANY, a corporation, MARTIN LUTHER KING, JR., FRED L. SHUTTLESWORTH, J. E. LOWERY, RALPH D. ABERNATHY, and S. S. SEAY, SR.,
Defendants.

CIVIL ACTION
No. 1707-N

MEMORANDUM OPINION

The above-captioned cases were submitted to this Court on April 26, 1961, upon the plaintiffs' separate and several motions, seeking to have this Court remand these causes to the Circuit Court of Montgomery, Alabama, State of Alabama, from whence each had been removed by the defendant The New York Times Company on April 13, 1961. Subsequent to this submission, this Court on May 24, 1961, ordered that Martin Luther King, Jr., one of the resident defendants in the case where John Patterson is a plaintiff, submit to oral interrogation by deposition. This action by

the Court was necessitated by reason of the representations to this Court by counsel in the John Patterson case to the effect that they expected to prove—upon trial—that Martin Luther King, Jr., was the president of the Southern Christian Leadership Conference, of which the other individual defendants are members of the executive committee, and that the individual defendants in each of these cases, through the Southern Christian Leadership Conference, specifically or impliedly authorized or ratified the publication of the alleged libelous article that forms the basis for these two actions. The testimony of the witness King was taken as directed, and has been considered by this Court along with the other testimony in evidence upon the separate and several motions.

The plaintiff in each of these cases is a resident citizen of the State of Alabama and was such at the time of the institution of each of these cases. In the Frank W. Parks case, the plaintiff sued the defendant The New York Times Company, a New York corporation, and Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, in the Circuit Court of Montgomery County, Alabama, for damages claimed to have been incurred on March 29, 1960, by reason of the publication of an alleged libelous article in The New York Times, a newspaper published by The New York Times Company. The New York Times Company is a nonresident corporation having its principal place of business in the City and State of New York. The individual defendants are resident citizens of the State of Alabama and were such at the time this suit was brought. In the John Patterson case, the plaintiff is a resident citizen of the State of Alabama and was such at the time of bringing this action. Plaintiff in that case sues the same defendants as are sued in the Parks case, with the addition of Martin Luther King, a resident citizen of the State of Georgia.

A brief chronological history of these cases is essential to an intelligent understanding of the questions presented by the motions to remand. In the Parks case, the action was filed in the Circuit Court of Montgomery County,

Alabama, on April 19, 1960. Service is claimed to have been effected on the defendant The New York Times Company on or about April 21, 1960. The defendant The New York Times Company removed this case to this Court on April 13, 1961. On the same date, the plaintiff filed his motion to remand this action to the State court. In the Patterson case, the action was filed in the State court on May 30, 1960. Service was claimed to have been obtained on the defendant The New York Times Company on or about June 1, 1960. This case was removed to this Court by the defendant The New York Times Company on April 13, 1961, and the plaintiff on April 20, 1961, filed his motion to remand to the State court. A similar case styled L. B. Sullivan, Plaintiff vs. The New York Times Company, a corporation, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, Defendants, was tried in the Circuit Court of Montgomery County, Alabama, commencing November 1, 1960. The Sullivan case terminated on or about November 3, 1960, with a verdict and judgment in favor of the plaintiff against all defendants. The basis for plaintiff's action in the Sullivan case was the same alleged libelous article that forms the basis for the plaintiff's action in each of these cases now before this Court. In the Sullivan case, the defendant The New York Times Company, subsequent to a jury verdict against it in the State court, filed with the State court a motion for a new trial, and that motion was denied by the State court on March 17, 1961.

The basis for the motion to remand in each of these cases is that this Court is without jurisdiction to hear and determine each case for the reason that the petition of The New York Times Company for removal was not filed in this Court, as required by statute, within twenty days after the receipt by the defendant The New York Times Company of a copy of the pleading setting forth the claim for relief by plaintiff in each case; further, that the individual defendants, with the exception of King in the Patterson case, are resident citizens of the State of Alabama and therefore there is no diversity within the meaning of Title

28, § 1332, United States Code Annotated. No question arises by reason of either of these motions as to the amount in controversy.

The theory of the defendant The New York Times Company in removing each of these cases to this Court is that at all times material to this litigation the defendant The New York Times Company was a corporation organized and existing under the laws of the State of New York with its principal place of business in New York City; that these cases are actions for damages against the defendants arising out of an alleged libel of the plaintiff in each case by the defendants on or about March 29, 1960; that this Court has jurisdiction in each of these cases under § 1332, Title 28, United States Code Annotated, by reason of the diversity of citizenship between the plaintiff in each case and the defendant The New York Times Company but for the fraudulent joinder of the individual defendants (with the exception of King, a resident of the State of Georgia), who are resident citizens of the State of Alabama; that the joinder by the plaintiff in each case of the defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery, was fraudulent, because there was at the time of the commencement of each of these actions and also at the time of the removal of same no reasonable basis under the law of Alabama upon which the liability of said individual defendants to the plaintiff in either case could be established for and on account of the alleged libelous publication made the basis for each action; and that the said resident defendants were joined in each of these cases for the sole purpose of fraudulently preventing the petitioner The New York Times Company from removing these cases to the United States District Court for trial. The New York Times Company says, further, that it did not sufficiently appear that either of these cases was removable because of the fraudulent joinder of the resident defendants until after the trial in the Circuit Court of Montgomery County, Alabama, of the Sullivan case and until after the State court had overruled the motion of The New York Times Company for a new

trial in that case and, further, until it became apparent that the plaintiff in each of these cases had no reasonable basis upon which the liability of said individual defendants could be established.

This Court, in each of these cases, in an effort to determine whether there is any legal basis whatsoever for the claim asserted against the resident defendants, has painstakingly studied all the evidence submitted and available, including a transcript of the trial in the Sullivan case. This Court reaches the conclusion that from the evidence presented upon the motion to remand in each of these cases there is no legal basis whatsoever for the claim asserted against the resident defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery. From the facts available to this Court, no liability on the part of the four resident defendants existed under any recognized theory of law; this is true even with the application of the Alabama "scintilla rule." Their joinder in each of these cases was therefore fraudulent as that term is applied in removal cases. The use of the term "fraudulent" in such instances is in the legal sense and not in the ordinary sense. Whenever in any case a plaintiff joins resident and nonresident defendants, the nonresident is privileged by statute to remove the action to the district court and challenge the good faith of the plaintiff in joining the resident defendants. In such instances, the removing-defendant has the burden of showing that the joinder was made without any reasonable basis and solely to defeat removal; this was the procedure followed by this Court in these cases. The defendant The New York Times Company in each of these cases sustained that burden by clear and convincing evidence that compels the conclusion that the joinder in each of these cases of the resident defendants was without any reasonable legal ground. In such cases, where it is clear from the evidence that the resident defendants cannot be liable to the plaintiff on any reasonable legal ground, the plaintiff is suing improperly and the federal court should not hesitate to retain jurisdiction after removal by the nonresident defend-

ant. See *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146, wherein it was stated:

> "A civil case, at law or in equity, presenting a controversy between citizens of different States and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599, 601; *Alabama Southern Railway Co.* v. *Thompson*, 200 U. S. 206, 218; *Wecker* v. *National Enameling Co.*, 204 U. S. 176; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316. So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith, as was the case in *Wecker* v. *National Enameling Co.*, supra. * * *"

See also *Dudley* v. *Community Public Service Company*, CCA 5, 1940, 108 F. 2d 119.

The basis for this Court's firm conclusion that the joinder of the resident defendants was fraudulent in a legal sense, because there was no reasonable basis under the law of Alabama upon which the liability of the individual defendants to either plaintiff could be established for and on account of the alleged libelous publication that is made the basis for each of these actions, is as follows:

There is no dispute as to what the evidence at the Sullivan trial showed as to the alleged sponsorship by the resident defendants of the alleged libelous article. In the cases now before this Court, neither plaintiff contends that

at a trial of this action he could or would offer any additional testimony, with the exception of the plaintiff Patterson, who, through his attorneys, contended that he expected the evidence to develop from the defendant King that King was the president of the Southern Christian Leadership Conference, of which the other individual defendants were members of the executive committee, and that said individual defendants through the Southern Christian Leadership Conference specifically or impliedly authorized or ratified the publication of the alleged libelous article. The evidence shows that the article in question was placed in The New York Times by an individual named John Murray, who was acting for a committee to defend Martin Luther King, Jr. Murray inserted the names of the four resident defendants as sponsors of the article. They were neither officers nor members of the committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted. On the question of authorization and ratification in instances such as this Court is now concerned with, the law of Alabama is well stated by the Supreme Court of Alabama in *W. E. Belcher Lumber Co.* v. *York*, 1944, 245 Ala. 286, 17 So. 2d 281, where the Alabama court stated:

> "Let us set out here the principle of ratification which will support a suit in trespass where it was by an agent without authority. It is thus stated in Burns v. Campbell, 71 Ala. 271, at pages 289, 290:
>
> " 'There is no difficulty about the general rules of law governing the ratification of an agent's unauthorized act by a principal. It is settled that where such

an agent, acting in the name and for the benefit of his principal, commits an unindictable trespass de bonis asportatis, or, in other words, a trespass which is voidable merely and not wholly void, as imposing a civil and not a criminal liability upon the perpetrator, the principal, after being fully informed of its tortious nature, may adopt it as his own act, and such ratification ordinarily binds the principal to the same extent, and holds him to the same civil responsibilities as if he had originally authorized it. And for many purposes the ratification will relate back to the date of the unauthorized act so as to constitute the principal a 'trespasser ab initio.'

"'But to hold the principal responsible for damages, in such cases, it must appear that he ratified the wrongful act of the agent with a full knowledge of its tortious character. Street v. Sinclair, supra, 71 Ala. 110; Lienkauf v. Morris, 66 Ala. 406. The mere appropriation of the fruits of the trespass without such knowledge, would not be sufficient. Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

"'Where the relation of agency exists, and the principal derives the benefit from an act beyond the scope of the agency, the principal will be held to have ratified such unauthorized act by acquiescence, if, after being fully informed of what has been done, he fails to express his dissatisfaction within a reasonable time. Mobile & M. Rwy. Co. v. Jay, 65 Ala. 113. There are many cases, however, where mere silence, or non-interference will not amount to a ratification. Whart. Agency, § 86; 2 Greenl. Ev. § 66.'"

The only question now remaining is whether the defendant The New York Times Company timely removed these cases to this Court. Actions are removable generally in accordance with the provisions of Title 28, § 1441, United States Code Annotated. Ordinarily the petition for removal shall be filed "within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief

upon which such action or proceeding is based, ...'"[1] Thus, in the ordinary case the plaintiff holds the key to the removability. He may stay out of federal court by failing to claim the requisite amount or by naming in good faith resident defendants. However, where upon removal there is presented the question of fraudulent joinder the legal principles are different. *Great Northern Ry. Co.* v. *Alexander*, 246 U. S. 276. See also *Alabama Southern Ry.* v. *Thompson*, 200 U. S. 206. In such instances of fraudulent joinder, there is no rigid twenty-day period which applies, and the courts will accept and should accept petitions filed within a reasonable time after the right to removal becomes apparent (that is, after the fraudulent joinder becomes evident).

From the evidence presented to this Court upon these motions, this Court is of the opinion, and so finds, that The New York Times Company filed its petition to remove in each of these cases within a reasonable time after it became apparent that the plaintiff in each of these cases had no legal basis for proceeding against the resident defendants, and the defendant The New York Times Company, after such became evident and on April 13, 1961, promptly removed each of these cases to this Court. There is no contention by either plaintiff here that The New York Times Company could have or should have petitioned this Court for removal within twenty days of the receipt of the complaints in April and May, 1960. This is true, since insofar as The New York Times Company then knew, the resident defendants were, in fact, sponsors of the alleged libelous article and were properly joined as defendants.

The requirement as to the time for removal in "fraudulent joinder" cases is not jurisdictional, and the time will be extended by the federal courts in such instances. This rule was laid down by the Supreme Court of the United States in *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92, where it was stated:

> "But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley,

[1] Section 1446, Title 28, United States Code Annotated.

'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel.''

As to the same principle laid down in the *Powers* case, see the Fifth Circuit case of *United States* v. *Fidelity and Casualty Company of N. Y.*, 218 F. 2d 503, where it was stated:

> "However, the time limitation prescribed by the removal statute within which a petition for removal may be filed is not jurisdictional, but is merely modal and formal, and failure to file the petition within the allotted time may be waived, or objection to such failure may be precluded by estoppel."

The test in delayed removals because of "fraudulent joinder" is whether the time is reasonable. This Court specifically finds that in each of these cases the removal to this Court on April 13, 1961, was within a reasonable time after it could have and should have become apparent to the defendant The New York Times Company that there was no reasonable basis under the law of Alabama upon which the liability of the individual defendants could be established for and on account of the alleged libelous publication made the basis for plaintiffs' actions. In this connection, see *Yulee* v. *Vose*, 99 U. S. 539; *Powers* v. *Chesapeake & Ohio Railway*, supra; *Kansas City Suburban Belt Ry. Co.* v. *Herman*, 187 U. S. 63; *Remington* v. *Central Pacific R.R. Co.*, 198 U. S. 95, and the opinion of Judge Grooms in the Northern District of Alabama in February, 1961, in *Fidelity & Casualty Company of N. Y., a Corporation, etc.*, v. *Safeway Steel Scaffolds Co., a Corporation, et al.*, 191 F. Supp. 220. This Court does not consider it necessary for an adjudication of the questions now presented by these motions to remand; but it is appropriate, however, to observe that the plaintiff in each of these cases is, in the opinion of this Court, estopped to assert that the removal petition of the defendant The New York Times Company in each of these cases was not timely filed. See *Ayers* v. *Watson*, 1885, 113 U. S. 594; *Northern Pacific*

Railroad Co. v. *Austin*, 1890, 135 U. S. 315; *Martin* v. *Baltimore & Ohio Railroad*, 1894, 151 U. S. 673; *Powers* v. *Chesapeake & Ohio Ry. Co.*, CCA 6, 1895, 65 F. 129; *Fritzlen* v. *Boatman's Bank*, 1909, 212 U. S. 364; *Wright* v. *Missouri Pacific R. Co., et al.*, CCA 8, 1938, 98 F. 2d 34; *Weeks* v. *The Fidelity & Casualty Company of N. Y.*, CCA 5, 1955, 218 F. 2d 503.

In accordance with the foregoing, this Court specifically finds and concludes that the joinder by each of these plaintiffs of the resident defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery, was fraudulent as that term is used in a legal sense in removal cases, and that the removal of each of these actions to this Court on April 13, 1961, was timely and proper. Formal orders will be entered accordingly.

Done, this the 26th day of June, 1961.

FRANK M. JOHNSON, JR.
United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19112

FRANK W. PARKS and JOHN PATTERSON,
Appellants,

versus

THE NEW YORK TIMES COMPANY,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

(September 18, 1962)

Before BROWN and BELL, Circuit Judges and AINSWORTH, District Judge.

BELL, Circuit Judge: This appeal is from an interlocutory order of the District Court pursuant to Title 28 USCA, § 1292(b) denying motions to remand. The opinion of the District Court which accompanied the order is reported in 195 F. Supp. 919 (M.D. Ala., 1961). The separate cases of the two appellants were consolidated for hearing in the District Court and here on appeal.

Appellant Parks sued The New York Times Company, a non-resident of Alabama and four individual residents in the Circuit Court of Montgomery County, Alabama for libel growing out of an advertisement appearing in the

March 29, 1960 issue of The New York Times. The names of the resident defendants appeared as endorsers of the material contained in the advertisement. The suit of appellant Patterson was in the same court and on the same basis. A more complete statement of the background facts is set out in our decision on a suit brought by the resident defendants against appellant Patterson seeking relief, inter alia, from the consequences of these and other libel suits. *Abernathy et al. v. Patterson*, 5 Cir., 1961, 295 F. 2d 452.

The question before us is whether appellee, The New York Times Company, could remove the suits of appellants to the Federal Court. The statutory period within which to remove had long since expired. Title 28, § 1446(b). Removal was sought under the doctrine of fraudulent joinder of the resident defendants. And, of course, the merits of the case including whether the advertisement was in fact libelous are not before us.

Five libel suits arose from the advertisement. All were filed in the state court against appellee and the four individual defendants, except that in the Patterson suit a Georgia resident was also named as a party defendant. The plaintiffs in the respective suits were Patterson, the Governor of Alabama, three city commissioners of Montgomery, Messrs. Sullivan, James and Parks, and Sellers, a former city commissioner.

The Sullivan and James cases have been tried. A $500,000 verdict for plaintiff against all of the defendants was rendered in the Sullivan case on November 3, 1960. A like verdict was rendered in the James case February 1, 1961. A motion for new trial filed by The Times was denied on March 17, 1961 and that case is now on appeal in the Supreme Court of Alabama. A similar motion in the James case was pending when these cases were removed on April 13, 1961.

The petition for removal was based on diversity of citizenship between the plaintiffs in each case and The New York Times Company, Title 28, § 1441(a). We are not concerned with removal of an action based on the constitution or laws of the United States, nor is there any claim of a

separate or independent claim being joined. Title 28, USCA, § 1441(b)(c). It was the position of The Times that it did not know of the fraudulent joinder until after the trials of the Sullivan and James cases in the state court when it became clear from uncontroverted evidence that the resident defendants had not in any manner authorized or consented to the using of their names as endorsers of the advertisement which gave rise to the alleged libel. The motions to remove set out explicitly that it became apparent to The Times after these trials and after the argument of counsel for plaintiffs to the juries therein that the theory of liability against the resident defendants was based on an assumed duty on the part of the resident defendants to disavow any connection with the advertisement.

The District Court determined that there had been a fraudulent joinder and denied the motions to remand. The evidence before the court on the motions was that adduced in the Sullivan case, as contained in a transcript of that trial introduced by agreement, the deposition of the Georgia defendant in the Patterson case which the trial court ordered taken ex moro motu by a court appointed amicus curiae. He also concluded that The Times had acted timely in the premises, a question we do not reach.

We take as a general guideline the admonition of the Supreme Court in *Shamrock Oil & Gas Corp.* v. *Sheets*, 1940, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214, a unanimous opinion, in reference to the administration of the removal statutes:

> "... The Power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy* v. *Ratta*, 292 U.S. 263, 270, 78 L.ed. 1248, 1253, 54 S.Ct. 700;"

And the rule applicable to fraudulent joinder as it obtains in this case was set out for this court in an opinion by Judge Sibley in *Dudley* v. *Community Public Service*, 5 Cir., 1939, 108 F. 2d 119, a case involving a petition for removal where a resident was joined with a non-resident defendant and doubt existed as to the liability of the resident defendant because of lack of exact precedent:

> "... We therefore hold that on the allegations of the petition there appears to be a probable case in law against Short, as well as against the Community Public Service Company, notwithstanding the application to them of the Compensation Act. By consequence it does not appear that Short was fraudulently joined. See *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544. That the defeat of removal might have been a motive in joining Short is not important, if in good faith he is sought to be held liable. *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A.L.R. 904, and cases cited. Though for lack of an exact precedent there may be doubt whether Short is legally liable, that would not render his joinder fraudulent. *Morris* v. *E. I. Dupont Co.*, 8 Cir., 68 F. 2d 788; *Wells* v. *Missouri Pac. R. Co.*, 8 Cir., 87 F. 2d 579. The case ought to have been remanded for trial in the State courts."

Cf. *Stone* v. *Foster*, N. D. Ark., 1958, 163 F. Supp. 298, where removal on the basis of fraudulent joinder was premised on the fact that no case was made out in the state court where the trial resulted in a mistrial against the defendants. The motion to remand was granted principally because the case against the resident defendant was submitted by the court to the jury. There was no directed verdict in his favor and the court felt that there must have been some testimony sufficient in the opinion of the Arkansas State Court to sustain a verdict for the plaintiff against the resident defendant.

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Schwyhart*, 1913, 227 U.S. 184, 33 S.Ct. 250, 57 L.Ed. 473, Mr. Justice

Holmes speaking for the court in an unanimous opinion laid down the following applicable rule:

> "On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied."

Morris v. *E. I. Dupont de Nemours & Company*, 8 Cir., 1934, 68 F. 2d 788 teaches that the determination of fraudulent joinder is to be based on whether there was a real intention on colorable grounds to procure a joint judgment. Doubt as to whether under the state law a case of joint liability is stated, or doubt with respect to the allegations concerning the resident defendants being false as when the question depends upon the credibility of witnesses or the weight of evidence will not render the joinder fraudulent. On the other hand, there must be some reasonable basis for believing that there is joint liability. The joinder is fraudulent if it is clear that, under the law of the state in which the action is brought, the facts asserted by the plaintiff as the basis for the liability of the resident defendant could not possibly create such liability so that the assertion of the cause of action is as a matter of local law plainly a sham and frivolous. And a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of plaintiff that there was joint liability.

Wells v. *Missouri Pacific R. Co.*, 8 Cir., 1937, 87 F. 2d 579, holds that the burden on a motion to remand to the state court is on the party who removed to the federal court, and that a complaint in the state court is good as against a motion to remove if it evidences a real intention to get a joint judgment, and if colorable ground for such judgment is shown. It follows *Morris* v. *Dupont*, supra, in the view that doubtful issues of law due to absence of definite pronouncements by the state supreme court are to be tried in the court having original jurisdic-

tion of the case and are not to be determined in a removal proceeding.

The doctrine is stated as follows in Moore's Commentary on the United States Judicial Code, Par. 0.03 (35), p. 234-236:

> "... The usual case in which charges of fraudulent joinder are made is that in which the plaintiff, a citizen of the state of the forum, joins a resident citizen with a non-resident defendant. Whether the joinder is fraudulent or not is said to depend on whether the plaintiff really intended to obtain a judgment against both defendants . . . The joinder may be fraudulent if the plaintiff fails to state a cause of action against the resident defendant, and the failure is obvious according to the settled rules of the state. If there is doubt as to whether the plaintiff has stated a cause of action, the joinder is not fraudulent, and the cause should be remanded . . . If the plaintiff has stated a cause of action against the resident defendant, that is normally sufficient to prevent removal. The motive for joining such a defendant is immaterial, even when the defendant is judgment-proof, or when the plaintiff is ultimately found not to have had a cause of action against the defendant. Bad faith in bringing the action is not material; bad faith in the joinder is necessary. The defendant may show bad faith in joinder by proving that the plaintiff stated the facts knowing them to be false, or with enough information within reach so that he should have known them to be false."

A claim of fraudulent joinder must be pleaded with particularity, and supported by clear and convincing evidence. Barron and Holtzoff, Federal Practice and Procedure, § 103, p. 478, citing *McLeod v. Cities Service Gas Company*, 10 Cir., 1956, 233 F. 2d 242. That case holds that bad faith in joining a resident defendant for the sole purpose of preventing removal may be shown by any means available but must be proven with certainty. The denial of remand was affirmed as not being clearly erroneous.

We pointed out in *Bentley v. Halliburton Oil Well Cementing Company*, 5 Cir., 1949, 174 F. 2d 788, that the doctrine of fraudulent joinder had its inception in the courts, and originally was a judicial pronouncement intended to protect non-resident defendants from any misstatement of fact or misjoinder of parties or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to a federal court. That case also points out what we think still to be the law; absent fraudulent joinder, plaintiff has the right to select the forum, to elect whether to sue joint tortfeasors and to prosecute his own suit in his own way to a final determination.[1]

On the strength of these authorities, and for the purposes of this case, we take the rule to be that there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard. One or the other at least would be required before it could be said that there was no real intention to get a joint judgment, and that there was no colorable ground for so claiming. *Chicago, Rock Island & Pacific Ry. Co.* v. *Schwyhard*, supra. And we measure the decision of the District Court against it.

The state trial judge in Sullivan permitted the question of ratification to go to the jury over the objection of the

---

[1] In *Weeks v. The Fidelity and Casualty Company*, 5 Cir., 1955, 218 F. 2d 503, we considered § 28 USCA, 1446(b) as being a congressional enactment to make uniform the time for filing petitions for removal, but the time limitation as being merely modal or formal and not jurisdictional.

And fraudulent joinder is to be distinguished from cases which become removable because of some action on the part of the plaintiff such as dismissing the resident defendant. *Powers v. Chesapeake & Ohio Railway Company*, 169 U. S. 92, 18 S. Ct. 264, 42 L. Ed. 673. This case also stands for the proposition that a cause may be removed when such occurs, and this would include discovery of fraudulent joinder if the petition to remove is filed at the earliest possible opportunity after the action assumes the shape of being removable.

resident defendants of insufficiency of evidence.[2] This alone, in the ordinary case is probably enough to avoid a charge of fraudulent joinder. Cf. *Stone* v. *Foster*, supra. Although decisions of nisi prius courts are not binding on us as precedents in applying local law in diversity cases, *King* v. *Order of United Commercial Travellers of America*, 1948, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608, there is no reason why their rulings may not be considered on the question of good faith in a matter such as this.

But we need not, and do not rest our decision solely on this fact. The evidence before the District Court on the motions showed that, although the names of the resident defendants appeared on the advertisement, they denied any knowledge of the advertisement until they received letters demanding retraction some two weeks later. They denied having consented to the publication of the advertisement and this was corroborated by the testimony of the witness who added their names to the advertisement as endorsers, that he did so without communicating with them. They failed to respond in any way to the letters

---

[2] At the conclusion of the evidence in the Sullivan case the resident defendants moved for an affirmative charge [directed verdict] on the ground of insufficiency of evidence to connect them with the advertisement. This was denied and the question of ratification or adoption of the advertisement was submitted to the jury on the following charge:

"Now, it is the contention of the plaintiff here that although you may believe, as to the four individual defendants, that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff, Sullivan, that the four individual defendants after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names, that is, that they approved and sanctioned this advertisement. In other words, the plaintiff, Sullivan, insists that there was a ratification of the advertisement and the use of their names as signers of the advertisement by the four individual defendants and we here define ratification as the approval by a person of a prior act which did not bind him but which was professedly done on his account or in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous authorization and is a confirmation or approval of what has been done by another on his account. Now, it is for you twelve jurors to say from all the evidence whether the four defendants ratified the advertisement now before you, that is, ratified the advertisement as I have defined the word ratification to you."

of retraction and never repudiated, renounced or disavowed the use of their names, or the advertisement itself.

The plaintiffs rely for their case on ratification or adoption on the silence of the resident defendants under circumstances requiring a denial. Other than the silence, the only evidence which in any way substantiates ratification is the sworn complaint filed by the resident defendants in *Abernathy v. Patterson*, supra, in which it is alleged that the advertisement was for their benefit and support, and the deposition of the Georgia defendant in the Patterson case in which the testimony was that an organization, of which he was president and in which the resident defendants were officers, received some of the funds raised through the medium of the ad.

The question would be whether the silence in the face of the inculpatory charges contained in the demand for retraction together with the circumstances that the advertisement was for the benefit of plaintiffs and that some of the funds derived therefrom went to the organization through which plaintiffs carry on their activities rose to the level, as a matter of law, of a sufficient basis from which a jury could infer ratification or adoption. The state trial judge in effect ruled that it did. In a proceeding of this nature we need not decide the question. We need only decide whether there was a reasonable basis in law and fact for such a contention in the state court suits. Stated differently, was there substance to the claims?

In 53 C.J.S., Libel and Slander, § 149, the question is treated as follows:

> "... One who adopts or recognizes the publication of a libelous article purporting to emanate from him may be liable therefor; but mere silence on the part of one in whose name a libel is unauthorizedly published will not render him liable."

The authority for this first statement is *Plecker v. Knottnerus*, 1926, 201 Iowa 550, 207 N.W. 574. There the defense to a libel based on a charge of insanity of plaintiff was that defendant signed without knowing the contents of the

document. The act of the defendant in testifying in support of the charge and in failing to withdraw the charge or attempt to dismiss it was held sufficient to show adoption of the libel. The latter statement is based on *Simmons v. Holster*, 1868, 13 Minn. 249; and *Dawson v. Holt*, 1883, 11 Lea (Tenn.) 583, 47 Am. Rep. 312. It is expressly pointed out in *Simmons* that the defendant sought to be held received no benefit from the libel. *Dawson v. Holt*, on the contrary, is to the effect that there is no duty upon the innocent person in such circumstances to disavow.

In the case of *Goldfield v. Brewbaker Motors, Inc.*, Ala. Court of Appeals, 1951, 54 So. 797, Cert. Den., 54 So. 2d 800, a case involving an unauthorized purchase of an automobile by a wife in which the husband attempted to recover the automobile traded in, the evidence was that the husband talked with the automobile dealer several times without attempting to rescind the contract. The verdict and the judgment in the trial court for the dealer was affirmed on appeal. The court with reference to the doctrine of ratification adopted the doctrine enunciated by the Supreme Court of Alabama in *Birmingham News Co. v. Birmingham Printing Co.*, 1923, 209 Ala. 403, 96 So. 336, as follows:

> "Intention, express or implied, to ratify an unauthorized act is a material factor in an inquiry of ratification vel non by an asserted principal; and the intent requisite may be inferred where there is evidence tending to show that the asserted principal, with adequate knowledge of the facts and circumstances, so conducted himself as to evince his purpose to confirm or adopt the unauthorized act of another."

In the *Birmingham News* case ratification was claimed on the basis of several statements of account having been sent it for goods sold to another who had an office in the Birmingham News building and was engaged in a business enterprise with that company. The News remained silent in the face of receiving the statements. The court said that under the circumstances, if the News re-

mained silent beyond a reasonable period after the receipt of the statement with respect to its thus asserted responsibility in the premises, such silence was evidence from which ratification might be inferred by the jury. See also I Restat. of the Law of Agency 2d, § 94, p. 244, Comments (a) and (b), and Appendix to § 94, Vol. III, p. 168; and IV Wigmore on Evidence, 3rd ed., § 1071 on adoption of the statement of another through silence where the circumstances call for a denial, and where the purported agent was theretofore a stranger to the purported principal.

On the other hand, there are cases in Alabama holding that self serving declarations contained in an unanswered letter will not be treated as admitted. *Fidelity and Casualty Company of New York v. Beeland Mercantile Company*, S. Ct. Ala., 1942, 7 So. 2d 265. Cf. *Denson v. Kirkpatrick Drilling Company*, S. Ct. Ala., 1932, 144 So. 86. And the *Birmingham News* case, supra, makes it clear that more evidence is required to establish ratification where the unauthorized act is by one not an actual agent than where the act is by an agent in excess of his authority.

The facts and these authorities indicate that the question of liability of the resident defendants is a close one. It could go either way. But, in either event, there is sufficient substance in the position of appellants to withstand a claim of fraudulent joinder. Appellants had the right to select their forum. Appellee failed to prove fraudulent joinder. It was error to deny the motions for remand. Having so held, it is unnecessary to, and we expressly do not, rule on the question of whether the motions to remove were seasonably filed.[3]

REVERSED and REMANDED for further proceedings not inconsistent herewith.

---

[3] By way of example, and citing the facts in the Parks case only, judgment was rendered in the Sullivan case on November 3, 1960. There was a stipulation between counsel on November 21, 1960 with reference to the transcript of the record in Sullivan, and in the Parks case, then pending, contemplating appeals to the Supreme Court of Alabama, which stipulation was approved by that court on December 9, 1960. There was a motion to quash service in the Parks case on December 16, 1960, which was denied on the same day. Interroga-

AINSWORTH, District Judge, dissenting:

Fraudulent joinder is said to occur in removal cases based on diversity of citizenship when there is no reasonable basis for believing there is joint liability between the resident and nonresident defendants. The joinder of resident defendants is thus said to be for the sole purpose of fraudulently preventing the nonresident from exercising its legal right to remove the case from the state court to the United States district court.[1] A conclusion that the

---

tories were served on The Times on January 31, 1961 and it was stipulated that the answers in the Parks case would be the same as in the Sullivan case. The judgment in the James case was rendered on February 1, 1961. On February 10, 1961 The Times filed a motion asking notice of the time and place of selecting the jury venire in the state court for the Parks case which motion was granted on the same day. On March 31, 1961 the jury venire was drawn in the presence of counsel for The Times and the case was set for trial on the merits on May 1, 1961. On March 17, 1961 the motion for new trial in the Sullivan case was denied. Petitions to remove in Parks and Patterson were filed on April 13, 1961. Parks moved to remand on the same date while Patterson removed to remand April 20, 1961.

The motions to remove allege that the fraudulent joinder was known at the conclusion of the trials of the Sullivan and James cases. The District Court accepted the excuse for the long delay thereafter before filing the motions that counsel for The Times thought appellants here might produce some additional evidence and only gradually became aware that they would not, after which realization they moved promptly.

[1] The Constitution of the United States provides for diversity jurisdiction in the federal courts. Article III, Section 2, "The Judicial Power shall extend to all Cases . . . between Citizens of different States . . . ." Of course, the federal diversity jurisdiction was not limited to controversies commenced in the federal courts or the purpose of diversity jurisdiction would be defeated. Accordingly, the first Judiciary Act of 1789 contained provisions for removal from state courts to the federal courts, and a removal jurisdiction has existed ever since. 1 Stat. 73 § 12 (1789). In general see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 91 (1923). *Railway Co. v. Whitton*, 80 U. S. (13 Wall.) 270 (1871); *Gaines v. Fuentes*, 92 U. S. (2 Otto) 10 (1875), and *Tennessee v. Davis*, 100 U. S. (10 Otto) 257, 265 (1879), wherein the Court said: "It [removal] was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use since." However, the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U. S. 265, 3 Cranch 267 (1806), greatly curtailed federal diversity jurisdiction and afforded an opportunity for plaintiffs to defeat federal jurisdiction. *Strawbridge* necessitated the development of the principle of fraudulent joinder.

resident defendant was joined fraudulently is thereby justified. The burden of proof is on the defendant who seeks removal and it must be clear that under the law of the state in which the action is brought the facts asserted by plaintiff as the basis for liability against the resident defendant could not possibly create such liability, and the asserted claim is therefore a sham and frivolous. *Morris* v. *E. I. Dupont de Nemours & Company*, 8 Cir., 1934, 68 F. 2d 788. These are the legal principles of this court-made rule and with which there can be no dispute.

Where the joinder is without reasonable basis and it is clear that no liability exists on the part of the resident defendants, the joinder in a legal sense is held to be fraudulent. *Johnson* v. *Kurn*, 8 Cir., 1938, 95 F. 2d 629.

"On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied." *Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 1913, 227 U. S. 184, 33 S. Ct. 250, 57 L. Ed. 473. And removability is determined as of the time of removal. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586 (1938).

In this matter the district court "has painstakingly studied all the evidence submitted and available" and has reached the conclusion "that from the evidence presented upon the motion to remand in each of these cases there is no legal basis whatsoever for the claim asserted against the resident defendants"; and the trial judge found that the defendant, The New York Times Company, had sustained the burden of proof "by clear and convincing evidence that compels the conclusion that the joinder in each of these cases of the resident defendants was without any reasonable legal ground." 195 F. Supp. 919, 922. The record in this case consisted principally of the complete transcript of the trial in the companion *Sullivan* case, the King deposition, and the sworn complaint in *Abernathy v. Patterson* filed in the same United States district court as the instant proceedings.

The district judge carefully analyzed the evidence to determine if there was any reasonable basis under the law of Alabama upon which liability of the resident defendants could be established and he found as follows:

> "There is no dispute as to what the evidence at the Sullivan trial showed as to the alleged sponsorship by the resident defendants of the alleged libelous article. In the cases now before this Court, neither plaintiff contends that at a trial of this action he could or would offer any additional testimony, with the exception of the plaintiff Patterson, who, through his attorneys, contended that he expected the evidence to develop from the defendant King that King was the president of the Southern Christian Leadership Conference, of which the other individual defendants were members of the executive committee, and that said individual defendants through the Southern Christian Leadership Conference specifically or impliedly authorized or ratified the publication of the alleged libelous article. The evidence shows that the article in question was placed in The New York Times by an individual named John Murray, who was acting for a committee to defend Martin Luther King, Jr. Murray inserted the names of the four resident defendants as sponsors of the article. They were neither officers nor members of the committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use their names in such a manner. Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted." 195 F. Supp. 919, 923.

The majority opinion apparently agrees with the principal findings of fact of the court below when it states: "Other than the silence, the only evidence which in any

way substantiates ratification is the sworn complaint filed by the resident defendants in *Abernathy v. Patterson*, supra, in which it is alleged that the advertisement was for their benefit and support, and the deposition of the Georgia defendant in the Patterson case in which the testimony was that an organization, of which he was president and in which the resident defendants were officers, received some of the funds raised through the medium of the ad." It then states the question, was there substance to the claims against the resident defendants in the state court suits?

I do not believe there was, for it is clear that the resident defendants had no knowledge of the insertion of the ad claimed to be libelous until several weeks after its publication. The resident defendants, though associated with Dr. King in the Southern Christian Leadership Conference, were not members of nor familiar with the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," which was responsible for insertion of the advertisement. The Conference and the Committee were entirely independent and separate groups and the resident defendants were not members of the Committee nor connected with it in any way. The King deposition disclosed that not even he authorized the use of his name in the advertisement in The New York Times (King deposition, page 80) nor does it appear that resident defendants in any way personally benefited from publication of the advertisement or the funds raised thereby, though some funds may eventually have been received by the Southern Christian Leadership Conference, of which they were officers. The circumstances here did not oblige them to issue a denial about the publication when demand for retraction was made by plaintiffs upon them. There is no evidence whatsoever on the part of the resident defendants of ratification by silence or otherwise of The New York Times' advertisement. In *Birmingham News*, 209 Ala. 403, 96 So. 336, cited by the majority, the Alabama Supreme Court held that "under the circumstances disclosed by the evidence" it would have been the duty of the defendant to communicate with the plaintiff within a reasonable time its

denial of liability of an item of charge against defendant for printing and if "under these circumstances" the defendant remained silent beyond a reasonable period after receipt of the bill the silence would evidence ratification. But the facts in the cited case are vastly different from those here.

The court below found the facts on the motion for removal, as it was obligated to do, under Rule 52(a) of the Federal Rules of Civil Procedure and unless these findings are "clearly erroneous" they should not be set aside. Findings of fact are not clearly erroneous unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. *Fleming v. Palmer*, 1 Cir., 1941, 123 F. 2d 749; Barron and Holtzoff, *Federal Practice and Procedure*, § 1133; *McLeod v. Cities Service Gas Company*, 10 Cir., 1956, 233 F. 2d 242. I believe the district judge's findings were supported by substantial evidence and are correct. The federal courts should be equally vigilant to protect the right to proceed in federal court as to permit the state courts in proper cases to retain their own jurisdiction; the duties of the court to exercise jurisdiction when conferred and not to usurp it when not conferred are of equal obligation. *Wecker v. National Enameling Co.*, 204 U.S. 176, 186; 27 S. Ct. 184 (1907); *Bank of the United States v. Deveaux*, 9 U. S. (5 Cranch) 61, 85 (1809).

I would therefore affirm the judgment of the district court in these cases.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 19,112

FRANK W. PARKS and JOHN PATTERSON,
Appellants

v.

THE NEW YORK TIMES COMPANY,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

ON PETITION FOR REHEARING (November 19, 1962)
BROWN and BELL, Circuit Judges and AINSWORTH, District Judge

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

AINSWORTH, District Judge: "I dissent".

U. S. COURT OF APPEALS
FILED
Nov 19 1962
EDWARD W. WADSWORTH
Clerk